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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

MRS. EDNA BRITT ..... Petitioner

vs.

UNITED STATES OF AMERICA ..... Respondent

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner is constrained to make a short response to the brief of the United States filed herein.

At the outset, it should be observed that the United States bases its entire position in this matter on what might have been done, rather than what was done. Footnote 3 on page 6 of the brief of the United States summarizes the contract between the broker and lender in such a way as to give a completely false impression as to the nature thereof. This foot note states that the timing of the deposits to the reserve "*could be* geared to the particular loan transactions . . ." and goes on to state that the taxpayer could have deposited the twenty-five percent in a single lump sum payment. In truth and in fact, the direct opposite is true. The entire contract, as well as the practice followed, and as the nature of the industry required, geared the increments to the re-

serve to each note as made, and parenthetically provided that the deposits *could be* made aside therefrom. The Court's attention is expressly requested to paragraph 4 of this contract (T. 12), wherein it is stated:

> "The broker agrees to deposit with the lender 3% of the amount of each draft drawn by the broker on the lender on behalf of the broker's customers, which said 3% *shall be deposited* in the guaranty fund hereinafter referred to and described and *shall be so paid by the broker as each draft is drawn* on the lender."

The argument of the United States is based upon the complete false assumption that there was an "indebtedness" existing between the taxpayer-broker to the lender, which it argues is satisfied by the retention by the lender of a portion of the brokerage fee in the reserve account. If this were true, the transaction would result in the reduction of an asset of the taxpayer-broker, and at the same time, an offsetting reduction of a liability in the form of an indebtedness to the lender. In truth and in fact, however, there is never an indebtedness from the broker to the lender, but merely a requirement that the lender retain a portion of the brokerage fee in the reserve account to secure the contingent liability of the taxpayer-broker on the notes. The transaction actually results merely in the "accrual" of an asset to the taxpayer-broker, but not the receipt thereof.

On page 8, under Point 1, the United States seeks solace in the fact that the brokerage is an obligation of the borrower, rather than of the lender, but this is of no significance whatsoever, as regardless of whose obligation it is, it is withheld by the lender and not received by the taxpayer-broker, which receipt is essential if he, as a cash basis taxpayer, is to be taxed thereon.

Under Point 2, the United States seeks to distinguish *Commissioner v. Hansen,* 360 U. S. 446, 79 S. Ct. 1270, 3 L. Ed. 2d 1360, on the theory that it involved a two party transaction, whereas the instant case involves three parties. The United States contended exactly to the contrary in *Family Finance, Inc. v. Commissioner of Internal Revenue,* 32 T. Ct. 1193 (1959), which involved a loan broker operating under an arrangement essentially identical with that in the instant case. There the United States contended that the facts were essentially similar to those involved in *Hansen v. Commissioner,* supra, and were controlled thereby. This argument of the United States therein was accepted by the tax court, which held that the reserve involved *accrued* to the *accrual basis* loan broker, the court saying:

> "The only difference between the instant case and the Hansen case is that the Hansen case and the Glover and Baird cases decided in that opinion all involved dealers who sold cars or trailers on installment contracts which they sold or assigned to the finance company that maintained the dealer's reserve account. The factual difference is immaterial . . . It is true that in the Hansen case the notes were made out to the dealers and later assigned or endorsed to the finance companies, while here the notes were not made out to petitioner. But the notes in the instant case were made out to industrial (the lender) or bearer, and the significant thing is that they were all unconditionally endorsed by petitioner before being sent to industrial. This factual difference is immaterial."

Surely this court will not permit the United States to argue before one tribunal that the facts in *Hansen* are essentially the same as applied to a loan broker, and

at the same time, argue before this tribunal the exact opposite.

The sole point of distinction made by the United States under Point 3 of the cases therein cited, is that the claim for refund herein was based on the theory that the reserves in question were not includable in the income of a cash basis taxpayer. This is indeed a frivolous argument, the United States seeking to take the position that the decision of this Court should depend upon whether or not a particular amount was excluded from the gross income shown at the top of a return, as distinguished from having been taken back out as an offsetting expense deduction on the lower portion of the return. Regardless of where the item is entered on the return, the economic and legal consequences are, and should be the same, and the effect of the ruling of the Court of Appeals herein is to deny petitioner its statutory right to maintain a reserve for bad debt to offset its contingent liabilities. As for the point raised in the last paragraph by the United States, to the effect that additions to a bad debt reserve, as well as actual losses paid, could not both be claimed, it is noted that the revenue agent who examined the taxpayer's records and prepared his report, made no complaint of the amount of the reserve, or the basis upon which the same was computed, but merely objected to its allowance at all.

CONCLUSION

Petitioner has hereinabove set forth factors of which it feels the court should be aware when analyzing the brief of the United States herein. Perhaps more significant than what was said by the United States in its brief, is what was not said. There is no response to the argument contained in petitioner's original petition herein

relating to the position taken by the Congress through the enactment of the Dealer Reserve Income Adjustment Act of 1960. No response was made to the argument made by petitioner as to what this Court actually said in *Hansen* as to when receipt would be made. No response was made to the argument made by petitioner as to the direct conflict between the position taken by the United States in the instant cause, and that taken by it on essentially identical facts in *Torti v. United States of America.* Petitioner again respectfully prays for the issuance of a Writ of Certiorari as originally applied for herein.

CERTIFICATE OF SERVICE

I, James Leon Young, one of the attorneys for petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I have this date served the foregoing reply to the brief of the United States in opposition to the petition for a writ of certiorari herein on the United States, by mailing true and correct copies thereof, air mail, postage prepaid, to:

Archibald Cox
Solicitor General
The Department of Justice
Washington 25, D. C.

Louis F. Oberdorfer
Assistant Attorney General
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Frederick Youngman
Attorney
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This the_____ day of_____, 19_____.

_____

James Leon Young
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